BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: STRUCTURAL SHOTCRETE SYSTEM 12645 Clark Street Santa Fe Springs, California 90670 Employer	Docket No.03-R4D3-986 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having granted Employer's Petition for Reconsideration, renders the following decision after reconsideration.

JURISDICTION

On August 28, 2002, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Structural Shotcrete Systems (Employer) at 17985 Pacific Coast Highway, Malibu, California.

On February 5, 2003, the Division issued a citation to Employer containing two Items. Item 1 alleged two instances of a violation of Title 8, Cal. Code Regs. § 1509(a) [training elements missing from IIPP; failure to maintain records of safety inspection], and Item 2 alleged a general violation of Title 8 Cal. Code Regs. § 1511(b) [failure to make a hazard survey]. Employer filed a timely appeal contesting the citation.

This matter came on regularly for hearing on March 3, 2005, before an Administrative Law Judge (ALJ) for the Board. At the opening of the hearing, the Division moved to amend Item 1, and to withdraw Item 2. The amendment did not alter the allegation of training components missing from the IIPP. It did alter the allegation regarding missing training records by changing the language of Item 1, subpart (2) from: "T8 CCR 1509(a) Injury and Illness Prevention Program. Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders. . . . (2) Employer has not

maintained records of safety inspections and safety training for an employee, and records of training via "tailgate" safety meetings as required in section 1509(e)" to: "T8 CCR 1509(a) Injury and Illness Prevention Program. Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders. . . . (2) Employer has not maintained records of safety inspections." Both motions met with no objection from employer, and were granted. The matter was submitted that day.

A decision was rendered on July 22, 2005, denying Employer's appeals. The ALJ found the violations of 8 C.C.R 1509(a) alleged in Item 1 were established for two reasons. First, she concluded the written Injury and Illness Prevention Program (IIPP) failed to include provisions for training employees in the following circumstances: when new job assignments were made for which previous training was not provided; when new substances, processes, procedures, or equipment are introduced in to the workplace and represent a new hazard; and whenever the employer is made aware of a new or previously unrecognized hazard. Second, she concluded that necessary inspection records were not maintained by the employer. Considering both shortcomings, she concluded the imposition of $185.00 penalty was warranted.

Employer filed a Petition for Reconsideration arguing that the multitude of safety rules in the IIPP cover all possible instances of work activity, and so it meets the purposes of the Act even though the exact language of the Safety Order cannot be found in the IIPP. It asserts the ALJ has elevated form over substance. It also claims Labor Code section 6317 requires more specificity in the amended citation than was contained in paragraph (2) of Item 1. In addition to claiming the specific sub-section of the Safety Order must be identified in the citation, the Petition asserts the Division had to prove the specific work activity being performed at the inspected location in order to prove both IIPP violations.

The Division filed a timely Answer to the Petition for Reconsideration. It asserted that the IIPP lacked substantive "triggering language," as required by the Safety Order. Specifically, the Division posits that when changes of the kind specifically listed in the Safety Order occur in the work of an employee, additional training must be performed. It asserts that initial training, hazardous material training, respiratory training, and weekly "as needed" training do not respond to the situations listed in the safety order, and so both the form and the substance of sections C, D and E of 3203(a)(7) are missing from the IIPP. The Division also responds that it is not required to establish the type of work being performed in order to establish a violation of section 1509(a) or (e), and that Petitioner's due process rights were not violated by the lack of a code reference in the citation regarding safety inspection.

EVIDENCE

The Division witness, inspector Miriam Abner, provided all of the testimony at the hearing. She stated that she requested the employer's IIPP and was provided with a 35 page document entitled "Injury and Illness Prevention Program" bearing letterhead of Structural Shotcrete Systems, Inc, which was admitted in to evidence as Exhibit 2. She testified she reviewed the IIPP and that some required training was listed in the IIPP, specifically initial training for newly hired employees. She also conceded that the IIPP required supervisors to familiarize themselves with hazards to which their employees might be exposed. She was clear, however, that the plan did not contain required additional training when new assignments were made to employees, when new items were introduced in to the workplace that presented a new hazard, or when a supervisor becomes aware of a new hazard. She opined these lapses were violations of Construction Safety Order 1509(a), which incorporates the requirements of 8 C.C.R. §3203(a)(7).

In reviewing the IIPP admitted in to evidence, it is clear that several sections refer to "training." Specifically, page 3 states that "[a]ll employees will be indoctrinated at the time of employment in order to aid him/her in conducting work with precaution. The indoctrination will consist of informing the worker of the safety practices, both general and specific for his work." There is no mention of how to respond with new training when changes occur to the so-indoctrinated employee's work, except for when new hazardous substances are introduced (p20-21), and when a "hazardous non-routine task" is introduced. For the new hazardous material, the entire pre-work hazardous materials training is required. When a "hazardous non-routine task" is introduced, no training is implemented, but information will be provided to employees that include "specific hazards" and "protective/safety measures which must be utilized." There is no provision for training for new tasks or procedures that are routine.

Also, on page 17, the document states weekly safety meetings will be held to, in part, provide special training. "Special training" is not defined in the document. The IIPP also states that initial, pre-work training will be provided to those employees encountering hazardous materials, or the need to wear a respirator. The respirator-trained employees will receive updated training annually. Again, there is no provision in these sections for providing additional training when employees are given new job assignments, or when additional processes, procedures, substances or equipment are introduced in to the workplace which create new hazards (other than "non-routine" ones), or when the employer becomes aware of a routine, new hazard. There is no guidance in the IIPP for supervisors to identify a routine from a non-routine hazard.

Also, Miriam Abner testified she requested records of safety inspections from the employer specific to the Malibu site, and that none were provided. Therefore, she issued the citation.

Employer did not offer any additional evidence. Employer articulated no prejudice it encountered in defending the citation.

ISSUES

1. Was sufficient notice given of the violation in Citation 1, Item1, subpart (2), for failure to maintain records of safety inspections?

2. Was there sufficient evidence in the record to support the ALJ's conclusion that specified classes of training, listed in section 3203(a)(7)(C)(D) and (E), were not included in the written IIPP?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. The Employer had adequate notice of the violation contained in Item 1 subpart (2).

The citation was sufficient to put Employer on Notice that it violated the 8 C.C.R § 3203 requirement that inspection records be maintained. The requirement of Labor Code section 6317 that each citation "shall describe with particularity the nature of the violation, including a reference to the [Safety Order] alleged to have been violated" was met here. (*DSS Engineering Contractors, Inc.*, Cal/OSHA App. 99-1023, Decision After Reconsideration (Jun. 3, 2002), citing *Lusardi Construction Company*, Cal/OSHA App. 86-1400, Denial of Petition for Reconsideration (May 31, 1989).) First, the citation not only referenced, but paraphrased, the safety order that was violated. Second, the nature of the violation was described with sufficient particularity in the citation to actually inform Employer of the substance of the alleged violation [failure to maintain safety inspection records].

"As long as an employer is informed of the substance of the violation and the citation is sufficiently clear to give fair notice and to enable it to prepare a defense, the employer cannot complain of technical flaws." *(Gaehwiler Construction, Co.*, Cal/OSHA App. 78-651, Decision After Reconsideration (Jan. 7, 1985).) In addition, the Employer must show prejudice in order to sustain an allegation that the description in the citation was not sufficiently particular. (*DSS Engineering Contractors, Inc.*, *supra*.) The underpinning of Labor Code section 6317 is the due process rights of Employers. (*Id.*) As such, a technical failure to cite the safety order at issue will result in granting of the Appeal if the citation fails to specify the nature of the charge, and the Employer

demonstrates some prejudice resulting from the alleged shortcoming. (*Rex Moore Electrical Contractors & Engineers,* Cal/OSHA App. 07-4314, Denial of Petition for Reconsideration (Nov. 4, 2009).) That is, merely failing to include the number of the sub-part of the Safety Order, without more, does not violate Labor Code section 6317.

Citation 1, Item 1, sub-part (2), was amended to read "T8 CCR 1509(a) Injury and Illness Prevention Program. Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders. . . . (2) Employer has not maintained records of safety inspections." Regulation 1509(a) states, "Every Employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders." That section, 3203, contains a subpart requiring a Program to state in writing that "Inspections shall be made to identify and evaluate hazards: . . . (B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace and represent a new occupational safety and health hazard." (3203(a)(4)(B).) Also, subpart (b) of 3203 requires records of inspections to be maintained. "Records of the steps taken to implement and maintain the Program shall include: (1) Records of scheduled and periodic inspections required by subsection (a)(4) to identify unsafe conditions and work practices. . . These records shall be maintained for at least one (1) year." This citation provided employer with sufficient notice of the nature of the violation.

The Division inspector asked for safety inspection records of any kind conducted at the Malibu work site, before issuing the citation, and none were provided. As testified to by the Division's witness, the worksite should have been inspected at the beginning of the job, as that would be a situation where new substances, processes, procedures or equipment would be introduced. (See 8 C.C.R. §3203(a)(4)(B).) There was also a reported accident, presumably generating an inspection required by 8 C.C.R. §3203(a)(5). Since the citation identified that the failure to maintain the safety inspection records was the substance of the violation, the employer was given adequate notice of the nature of the claim it faced. Moreover, the citation references both section 1509(a) and 3203. The records requested, and not produced, were those required by section 3203, not records of some other Safety Order. Moreover, no ambiguity was claimed, nor can any be discerned, arising from the verbiage of the amended citation. Employer has not provided any evidence on which to conclude it was unaware of the nature of the conduct that was the subject of the citation, or that is suffered any prejudice in preparing a defense thereto.

The Decision is affirmed regarding employer failure to provide records of inspections conducted pursuant to section 3203.

2. The Division met its burden of proof that required elements of the IIPP were missing.

The elements of the cited safety order must be established by the Division. (*Trio Metal*, Cal/OSHA App. 03-0317, Decision After Reconsideration (Feb. 25, 2009).) The cited safety order was section 1905(a), which references the listed components of an IIPP as articulated in section 3203. That section states, in part, "every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum: (7) Provide training and instruction: . . . (C) To all employees given new job assignments for which training has not previously been received; (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard; (E) Whenever the employer is made aware of a new or previously unrecognized hazard[.]"8 C.C.R. 3203(a)(7)(C)(D) & (E).[1]

The Division need only show one missing component, of the many required by the safety order, in order to establish a violation. (*Tutor-Saliba-Perini*, Cal/OSHA App. 97-3209, Decision After Reconsideration (Apr. 24, 2003).) The Division cited Employer for all of the training portions of an IIPP, and established three of them through the testimony of its witness, and the IIPP itself. Inspector Abner testified that the requirements of subsections (7)(C), (D), and (E) were not satisfied by the written plan. She testified that these sections require the plan to include written elements providing specific, *additional* training. Although some training, hazard identification and communication elements were included in the plan, they were not the ones required by the cited portion of section 3203. Specifically, she located portions within the IIPP that required initial training of employees, which appear as a requirement to "indoctrinate" new employees on matters such as safety. She also located portions requiring supervisors be trained, portions stating tailgate meetings should be held for the purpose of communication, and she found the requirement that hazards will be corrected. She concluded these were not written provisions requiring *additional* employee training as triggered by subsections 7(C), (D) & (E). The Division established a prima facie case of a Title 8, C.C.R. 1905(a) violation. *Mountain Cascade*, Cal/OSHA App. 01-3561, Decision After reconsideration (Oct. 17, 2003).

The burden of proof then shifted to the employer to identify the portions of the plan that it claims satisfy sections 3203(a)(7)(C), (D) and (E). (*Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After

[1] Contrary to the assertion on page 11 of the Petition for Reconsideration, there is no requirement that the Division establish the type of work being performed by the employer at the time the safety order was violated in the case of an alleged 3203 violation. The IIPP requirement applies to all employers who have employees. (*MCI Worldcom*, Cal/OSHA App. 00-440 Decision After Reconsideration (February 13, 2008). The Division witness testified Structural Shotcrete System had employees working at the Malibu site previous to the issuance of the citation.

Reconsideration (Oct. 7, 2004), citing 1 Witkin, Cal. Evidence (4thEd 2000) Burden of Proof and Presumptions §2; see also Evid. Code §550(a).) The employer produced insufficient evidence to satisfy those requirements. Instead it posited an argument that the purpose of an IIPP is to provide an "effective" safety program. (Petitioners Opening Brief, page 10). It argues that many situations are listed in the IIPP and so finding anything missing is "incredulous." (Id. P.8.) With so many situations accounted for, and listed on pages 7-9 of its brief, Petitioner therefore asserts that the technical omission of the language of subparts (C), (D) & (E) was not a violation. This is essentially a "substantial compliance" argument.

However, omitting required items from the written IIPP is a violation of section 3203. "'In construing statutes, we must determine and effectuate legislative intent.' [Citation.] 'To ascertain intent, we look first to the words of the statutes' (*ibid.*), 'giving them their usual and ordinary meaning' [citation]. If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.' [Citation.] 'Where the statute is clear, courts will not "interpret away clear language in favor of an ambiguity that does not exist.' [Citation.]' (*Lennane* v. *Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268.)" (*Pulaski v. California Occupational Safety and Health Standards Board* (3rd Dist.1999) 75 Cal.App.4th 1315, 1338 -1339).) Under the "plain meaning rule," words used in a safety order should be given the meaning they bear in ordinary use and if the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of legislative intent. (*The Home Depot*, Cal/OSHA App. 98-2236 Decision After Reconsideration (Dec. 20, 2001).)

Training requirements that must specifically be in the IIPP responsive to introducing any and all new assignments, processes or hazards in to the workplace are not satisfied by the sections of the plan quoted in the Petition (i.e. weekly tailgate meetings where "special training" might occur; "non-routine" hazard training; hazardous materials and respirator training). Nor can we locate these required items anywhere in the written plan. The written provisions will capture some instances when new hazards are introduced in to the workplace, but not all.

We decline to read out of the administrative enactment the requirement that the written plan include specific types of training. The listed components in the Safety Order must be in the written plan. *Mountain Cascade, supra.* Under Employer's plan, if an existing employee was moved to a new assignment where different hazards existed, there is no written requirement to re-train that employee. This violates the requirement of section 3203(a)(7)(C).

DECISION AFTER RECONSIDERATION

We have independently reviewed the entire IIPP, and conclude that no sections instruct supervisors, or any others, to provide additional training when new job assignments are made for which the employee has not previously been trained, or when new substances, processes, procedures or equipment are introduced into the workplace and represent a new hazard, or whenever the employer is made aware of a new or previously unrecognized hazard. Employer's submitted plan requires initial training, supervisor training, hazard identification and abatement, and communication to employees of hazards. None of these indicate the required training will also be done. We conclude that required sections of the IIPP were not included in the submitted plan. We also conclude that records of inspections, required by section 3203, were not produced, which justifies the inference that none were maintained. The penalty of $185.00 is reasonable, and hereby imposed.

CANDICE A. TRAEGER, Chairwoman
ART R. CARTER, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JUNE 10, 2010